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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 MARIA ALVAREZ,

13 Plaintiff,

14 v.

15 COMMISSIONER OF SOCIAL SECURITY,

16 Defendant.
17

No. C-02-05871 RMW

ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S CROSS-
MOTION FOR SUMMARY JUDGMENT

[Re Docket Nos. 8, 9]

18
19 Plaintiff Maria Alvarez brings this action pursuant to 42 U.S.C. § 405(g) for judicial review
20 of the decision of the Commissioner of Social Security ("Commissioner") denying her claim for
21 Supplemental Security Income ("SSI") under Title XVI of the Social Security Act. Plaintiff and
22 defendant filed cross-motions for summary judgment. Plaintiff alleges that the findings of the
23 administrative law judge ("ALJ") are unsupported by substantial evidence and were reached by
24 improper application of law. Specifically, plaintiff claims the ALJ erred in five ways: (1) finding
25 that plaintiff had a marginal education; (2) finding that plaintiff retained a residual functional
26 capacity ("RFC") to perform light work, with limitations for occasional kneeling and climbing; (3)
27 finding that plaintiff retained the ability to perform simple, unskilled work and rejecting plaintiff's
28 contention that she suffered from disabling chronic depression or was disabled with regard to her

1 memory, concentration, and ability to understand multi-step instructions; (4) considering plaintiff's
2 work history when assessing her credibility; and (5) failing to consider a Daily Activities
3 Questionnaire ("DAQ") submitted by third party Leota Kanellis.

4 Per this court's procedures for review of social security actions, the parties' motions have
5 been submitted without oral argument. Based on the moving papers and the court's own analysis of
6 the record, the court hereby denies plaintiff's motion for summary judgment and grants defendant's
7 cross-motion for summary judgment.

8 I. BACKGROUND

9 A. Procedural History

10 Plaintiff had previously filed an application for Supplemental Security Income ("SSI")
11 benefits on December 18, 1996. She submitted a claim for Disability Insurance Benefits on
12 December 23, 1996. These claims were denied by the Administrative Law Judge ("ALJ") on
13 November 20, 1998. (A.R. 52-58). Plaintiff's request for review of the ALJ decision was denied on
14 April 11, 2000. (A.R. 62-67).

15 Plaintiff filed the current application for Supplemental Security Income ("SSI") benefits on
16 June 19, 2000. (A.R. 92-95). The application was denied by the Commissioner initially and on
17 reconsideration on February 21, 2001 and May 10, 2001, respectively. (A.R. 64-67, 73-76). Plaintiff
18 then filed a request for hearing before an Administrative Law Judge ("ALJ") on July 20, 2001. In a
19 decision issued on June 21, 2002, the ALJ found that plaintiff was not disabled because she was still
20 able to perform a significant number of jobs in the local and national economy. (A.R. 14-20).
21 Plaintiff filed a request for review with the Appeals Council, and on October 22, 2002 the Appeals
22 Council denied her appeal, making the decision of the ALJ the final decision of the Commissioner
23 (A.R. 5-6). This civil action followed.

24 B. Plaintiff's Vocational and Medical History

25 Plaintiff was 47 years old at the time of the ALJ's most recent decision. (A.R. 24). She had
26 completed five years of education in Mexico. (A.R. 24). From approximately 1964 to 1984,
27 plaintiff worked as a field worker. In 1984, plaintiff injured her left knee, and in 1985 she had
28 arthroscopic surgery on her left knee performed by Dr. Godley in Watsonville. (A.R. 192). Plaintiff

1 states that pain from her knee and her back have kept her from working regularly since 1984. (A.R.
 2 25-28). Plaintiff also suffers from asthma and complains of headaches. For the last five years she
 3 has been taking Prozac, Elevil, and Zoloft for depression. (A.R. 41)

4 Because plaintiff has not worked regularly since 1984 (A.R. 25), the ALJ found she had no
 5 past relevant work experience. (A.R. 19). *See* 20 C.F.R. § 416.965 (2002) (past relevant work is
 6 work that a claimant has performed within the past 15 years). The ALJ also determined that plaintiff
 7 is a "younger individual," *see* 20 C.F.R. §§ 416.963, 404.1563, and that she has a "marginal
 8 education." *See* 20 C.F.R. §§ 416.964, 404.1564; A.R. 25.

9 The ALJ found that plaintiff had the residual functional capacity to perform a wide range of
 10 light exertional work. Specifically, plaintiff could lift and carry up to 10 pounds frequently and 20
 11 pounds occasionally, stand and walk up to 6 hours a day (with breaks every hour) and occasionally
 12 climb and kneel, and could sit without limitation. (A.R. 19).

13 II. LEGAL STANDARDS

14 A. Statutory and Regulatory Framework

15 To qualify for benefits under Title XVI of the Social Security Act, the claimant must
 16 establish that she has a disability. A disability will be found only if the individual's physical or
 17 mental impairment is so severe that she "is not only unable to do [her] previous work but cannot,
 18 considering [her] age, education, and work experience, engage in any other kind of substantial
 19 gainful work which exists in the national economy" 42 U.S.C. § 1382c(a)(3)(B).

20 The SSA has formulated regulations establishing a five-step sequential evaluation process to
 21 determine disability. *See* 20 C.F.R. § 416.920. If at any step the SSA makes a conclusion of
 22 disability or non-disability, the evaluation process terminates. 20 C.F.R. § 416.920(a)(4). The first
 23 step requires a consideration of claimant's current work activity and a determination of non-
 24 disability if she is doing "substantial gainful activity." The second step calls for an evaluation of
 25 whether claimant suffers from a severe medically determinable impairment that meets the duration
 26 requirement of twelve months and a conclusion of non-disability if she does not. At the third step,
 27 the SSA assesses whether claimant's condition meets or equals any impairments on the SSA's
 28

1 predefined list of qualifying impairments¹ ("Listings") and must conclude she is disabled if it does.
 2 The fourth step involves an evaluation of whether claimant can perform her past relevant work and
 3 requires a determination of non-disability if she can. The fifth step requires a consideration of
 4 whether claimant can move to alternative work, with a denial of disability if she can and a
 5 conclusion of disability if she cannot. *Id*; see also *Barnhart v. Thomas*, 124 S. Ct. 376, 379-380
 6 (2003) (describing the five-step SSA process for determining disability).

7 In addition, before moving from step three to four, the SSA assesses the claimant's residual
 8 functional capacity ("RFC"). 20 C.F.R. § 416.920(a)(4). RFC depends on the medical and other
 9 evidence in claimant's record and is used during the last two steps of determining plaintiff's ability to
 10 do her relevant previous work or other work. 20 C.F.R. § 416.920(e). In the final step, so-called
 11 "vocational factors" of age, education and past work experience are also considered in determining
 12 whether claimant can transition to other work. 20 C.F.R. § 416.920(f).

13 **B. Scope of Review**

14 Under Social Security Act § 405(g), a district court reviewing the Commissioner's
 15 decision on an application for benefits may affirm, reverse, or remand. See *Harman v. Apfel*, 211
 16 F.3d 1172, 1174 (9th Cir. 2000) (citing *Ramirez v. Shalala*, 8 F.3d 1449, 1451 (9th Cir. 1993)). The
 17 district court's scope of review is limited. This court will not disturb the Commissioner's denial of
 18 disability benefits unless the Commissioner's findings of fact are not supported by substantial
 19 evidence or the Commissioner failed to apply the proper legal standard. 42 U.S.C. § 405(g);
 20 *Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *Tacket v. Apfel*, 180 F.3d 1094, 1097-98
 21 (9th Cir. 1999); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992).

22 Evidence is substantial if it is more than a mere scintilla but less than a preponderance.
 23 *Tacket*, 180 F.3d at 1098. Substantial evidence means "such relevant evidence as a reasonable mind
 24 might accept as adequate to support a conclusion." *Paulson v. Bowen*, 836 F.2d 1249, 1250 (9th Cir.
 25 1988). To determine whether substantial evidence supports the Commissioner's findings, this court
 26 must review the administrative record as a whole, weighing evidence that both bolsters and detracts

27
 28 ¹ The "listing of impairments" is contained in 20 C.F.R. Pt. 404, Subpt. P, App. 1.

1 from the Commissioner's conclusion. *Tacket*, 180 F.3d at 1098. When the evidence is susceptible to
 2 more than one rational interpretation, this court must adopt the decision of the ALJ. *Matney*, 981
 3 F.2d at 1019; *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997). Questions of credibility and
 4 resolution of conflicts in the testimony are functions solely for the ALJ. *Allen v. Heckler*, 749 F.2d
 5 577, 579 (9th Cir. 1984).

6 III. ANALYSIS

7 A. Plaintiff's Education Level

8 The ALJ found that plaintiff had a "marginal education." *See* Tr. at 20.² Plaintiff contends
 9 that this classification was incorrect, as plaintiff went to school through only the fifth grade in
 10 Mexico and is illiterate in English. When filling out her social security forms, she did not fill them
 11 out herself. (A.R. 25). Thus, plaintiff argues that she should be classified as illiterate. Plaintiff also
 12 argues that by classifying her education as "Limited or less – at least literate and able to
 13 communicate in English," the ALJ found that she was literate in English and improperly heightened
 14 her education level classification from marginal education to limited education.³ However, the
 15 purpose of the ALJ's classification of plaintiff's education level as "limited or less" was for
 16 application of the "Medical-Vocational Guidelines" at 20 C.F.R. Pt. 404, Subpt. P, App. 2.⁴ These
 17 guidelines do not include a category for "marginal education." The next education category below
 18 the "limited or less" education category is illiterate, and therefore the "limited or less" category
 19 includes people with a marginal education.

22 ² (2) Marginal education. Marginal education means ability in reasoning, arithmetic, and
 23 language skills which are needed to do simple, unskilled types of jobs. We generally consider that
 formal schooling at a 6th grade level or less is a marginal education. 20 C.F.R. § 416.964(b)(2).

24 ³ (3) Limited education. Limited education means ability in reasoning, arithmetic, and
 25 language skills, but not enough to allow a person with these educational qualifications to do most of the
 26 more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade
 through the 11th grade level of formal education is a limited education. 20 C.F.R. § 416.964(b)(3).

27 ⁴ The Medical-Vocational Guidelines in 20 C.F.R. Pt. 404, Subpt. P comprise of a list of
 28 rules for the disability determination based on age, education, and previous work experience. "[I]f the
 findings of fact made about all factors are the same as the rule [in 20 C.F.R. Pt. 404, Subpt. P], we use
 that rule to decide whether a person is disabled. 20 C.F.R. § 416.969.

Here, the ALJ concluded plaintiff was both literate and able to communicate in English.⁵ The ALJ concluded that plaintiff was literate because she testified at the hearing that she could read "a little bit." (A.R. 25). The ALJ also concluded that plaintiff was able to communicate in English as she testified at the hearing without the need for an interpreter. (A.R. 25). Based on these determinations, the ALJ applied Rule 202.17 of the Medical-Vocational Guidelines, which supports a conclusion of "not disabled." *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, 202.17. Although plaintiff argues that she didn't specify whether she could read "a little bit" in English or Spanish, the court is satisfied that substantial evidence supported the ALJ's determination that plaintiff has a marginal education. Moreover, even if the ALJ had determined that plaintiff was "illiterate," such determination would only result in Rule 202.16 being applied, which also supports a conclusion of "not disabled," *unless* plaintiff further shows that she is capable only of sedentary work.⁶ As discussed below, this court affirms the ALJ's conclusion that plaintiff has the RFC to perform a "wide range of light exertional work." Therefore, the Medical-Vocational Guidelines support a finding of "not disabled" whether plaintiff's education level is classified as "limited or less" or "illiterate."

B. Plaintiff's Residual Functional Capacity

Plaintiff objects to the ALJ's conclusion that she retains RFC to perform light work, with limitations for occasional kneeling and climbing. The ALJ found that plaintiff

has the residual functional to lift and carry up to 10 pounds frequently and 20 pounds occasionally, stand and walk up to 6 hours a day (with breaks every hour) and occasionally climb and kneel. There is not limitation on her ability to sit.

(A.R. 19).

⁵ Defendant erroneously argues that in order to be classified as illiterate, plaintiff must show that she is both illiterate and unable to communicate in English. However, the case upon which defendant relies for this proposition, *Chavez v. Secretary of HHS*, 103 F.3d 849, 852 (9th Cir. 1996), was clarified in *Silveira v. Apfel*, 204 F.3d 1257 (9th Cir. 2000). In *Silveira*, the Ninth Circuit clarified that a claimant is illiterate if she is illiterate or unable to communicate in English, or both, not that a claimant must be both illiterate and unable to communicate in English. *See* 204 F.3d at 1262 n.13. Therefore, to be classified as illiterate, plaintiff need only show that she is either illiterate or unable to communicate in English.

⁶ If plaintiff was capable only of sedentary work *and* is illiterate, Rule 201.17 of the Medical-Vocational Guidelines would apply and direct a finding of "disabled."

1 Plaintiff argues: (1) needing breaks every hour is inconsistent with the ALJ's finding that she
 2 can perform a "wide range of light exertional work," (A.R. 19); (2) the ALJ's determination was
 3 inconsistent with a previous ALJ decision that she was capable of sedentary, not light work, (A.R.
 4 55, 57); and (3) that the ALJ's findings were inconsistent with the medical evidence.

5 Defendant argues that the ALJ properly found that changed circumstances existed in
 6 plaintiff's case. The ALJ based its decision in part on a December 2000 orthopedic evaluation
 7 plaintiff underwent with Dr. Hideki Garren, who opined that plaintiff was able to perform light work
 8 with breaks every hour. (A.R. 188-90).⁷ The ALJ also gave minimal weight to the opinion of
 9 plaintiff's physician, Dr. Jeffrey Young of Santa Cruz Health Services, noting that Dr. Young's
 10 records did not contain any descriptions of any detailed examinations of or physical findings related
 11 to plaintiff's musculoskeletal structure or any laboratory tests. As between Dr. Young and Dr.
 12 Garren, both of whose opinions were given the weight accorded to a general practitioner, the ALJ
 13 found that Dr. Garren's opinion had a better basis in the medical records. (A.R. 16). The court finds
 14 that substantial evidence supported the ALJ's decision that plaintiff exhibited changed circumstances
 15 qualifying her for light work, and further that substantial evidence supported the ALJ's rejection of
 16 Dr. Young's opinion in favor of Dr. Garren's opinion.

17 **C. Plaintiff's Residual Mental Capacity ("RMC")**

18 The ALJ found that the plaintiff could perform simple, unskilled work, noting the lack of
 19 mental health treatment. (A.R. 17).⁸ On January 26, 2001 plaintiff underwent a consultative
 20 psychiatric evaluation with Dr. Ronald Johnson. Dr. Johnson diagnosed plaintiff with depressive
 21 disorder, not otherwise specified; psychological factors affecting her physical condition; a history of
 22 alcohol abuse, in stated remission; a history of cocaine abuse, in stated remission; personality
 23 disorder, and life circumstance problems. *See id.* Dr. Johnson found no evidence of a formal
 24 thought disorder, major affective disorder, formal anxiety disorder or obvious organicity, and also

25 ⁷ Dr. Garren's impressions included chronic low back pain without evidence of
 26 radiculopathy, chronic left knee pain, status post left knee surgery in 1984 likely degenerative in nature,
 27 chronic right ankle pain, mild asthma, and a history of non-cardiac chest pain. Decision at 16.

28 ⁸ Unskilled work is defined as jobs that can be learned in 30 days or less. 20 C.F.R. §
 416.968(a).

1 found that plaintiff's sensorium was grossly intact. The only reference to depression was Dr.
2 Young's January 3, 2002 prescription of Prozac and Zoloft. Dr. Young did not specifically restrict
3 plaintiff from simple, unskilled work, and Dr. Young also stated that plaintiff's depression was better
4 than it had been in 1997. The ALJ also noted that plaintiff has not sought more aggressive treatment
5 for her alleged impairments, including treatment from a mental health specialist, nor has Dr. Young
6 referred plaintiff to a mental health specialist. Because the ALJ found little or no objective evidence
7 supporting plaintiff's alleged mental impairments, plaintiff was classified as able to perform
8 unskilled work.

9 Plaintiff argues cursorily that she cannot perform unskilled work because she cannot
10 maintain enough concentration to do work that takes up to 30 days to learn. The court is satisfied
11 that substantial evidence supports the ALJ's decision that plaintiff could perform simple, unskilled
12 work.

13 **D. Plaintiff's Credibility**

14 The ALJ found that plaintiff's complaints about pain and her physical abilities were not
15 credible. The ALJ noted that there were no reported continuous side effects from medication, and
16 that plaintiff's complaints regarding the frequency, severity and duration of her multiple joint pain,
17 back pain, chest pain, and knee pain do not justify any limitations beyond those based on the
18 objective medical evidence. The ALJ also noted that the limitations found took into account
19 plaintiff's knee impairment, that plaintiff's back pain was not substantiated by a physician ordering
20 an x-ray, and that Dr. Garren noted plaintiff had a full range of motion in all four extremities. In
21 addition, plaintiff had no relevant work history, which calls into question her motivation to work.
22 As such, the ALJ did not credit claimant's statement regarding her inability to do light work.

23 Plaintiff argues that the ALJ was required to find "clear and convincing" reasons for rejection
24 of plaintiff's statements and testimony. *See Regennitter v. Commissioner of Social Sec. Admin.*, 166
25 F.3d 1294, 1296 (9th Cir. 1999). Plaintiff contends that the ALJ's finding of no relevant work
26 history, the ALJ's failure to consider plaintiff's almost 20 years of work in agricultural fields, and
27 plaintiff's failure to seek "more aggressive" treatment for her mental and physical ailments, do not
28 meet the clear and convincing standard. Defendant notes that plaintiff has not worked in agricultural

1 fields since the early 1980s, (A.R. 104), plaintiff's impairments have been controlled with
 2 medication, and that even when plaintiff sought treatment for mental and physical impairments, it
 3 was not on a regular basis. (A.R. 142, 223-25).

4 In *Regennitter*, the Ninth Circuit held that "Because Regennitter produced medical evidence
 5 of underlying impairments consistent with his complaints and there is no affirmative evidence that
 6 he is malingering, the ALJ's reasons for rejecting Regennitter's testimony must be clear and
 7 convincing." 166 F.3d at 1296 (citing *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995)). The Ninth
 8 Circuit went on to note that plaintiff Regennitter had received regular treatment for his impairments,
 9 even after insurance coverage ran out, on thirty-two occasions during the five years prior to his
 10 second hearing, and that none of the doctors were able to suggest effective treatment for his pain.
 11 See *id.* Here, the ALJ found some evidence of malingering and also that the medical evidence did
 12 not support plaintiff's contentions. Plaintiff's testimony without the support of objective medical
 13 evidence is insufficient to establish disability. See 20 C.F.R. §§ 416.929(a) ("statements about your
 14 pain or other symptoms will not alone establish that you are disabled"), 404.1528(a) ("Your
 15 statements alone are not enough to establish that there is a physical or mental impairment"); *Flaten v*
 16 *Secretary of HHS*, 44 F.3d 1453, 1464 (9th Cir. 1995) ("An opinion of disability premised to a large
 17 extent upon a claimant's own accounts of his symptoms and limitations may be disregarded where
 18 those complaints have been 'properly discounted.'"). The ALJ's findings regarding plaintiff's
 19 credibility are supported by substantial evidence.

20 **E. Whether the ALJ Improperly Ignored Lay Evidence**

21 Leota Kanellis, Program Manager at plaintiff's shelter, completed a Daily Activities
 22 Questionnaire reporting that plaintiff's pain affected her ability to do chores, and that plaintiff had
 23 very limited activities and problems with her memory. Plaintiff contends that these findings are
 24 inconsistent with the ALJ's conclusion that she could perform a wide range of light work. As the
 25 ALJ failed to consider this evidence, plaintiff argues that the ALJ's findings are fundamentally
 26 flawed. See *Regennitter*, 166 F.3d at 1298; *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996)
 27 ("lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is
 28 competent evidence, [], and therefore cannot be disregarded without comment.") (citations omitted).


1 Defendant notes numerous discrepancies between Kanellis's report and plaintiff's statements.
2 Specifically, Kanellis's report indicates that plaintiff lives in a housing program with friends, that she
3 has no problems caring for her own personal needs, can perform limited chores with weight belts
4 and does not shop, that plaintiff needs no assistance to go outside, and that plaintiff's social
5 activities have not changed since her condition began. Defendant contends that each of these
6 statements is contradicted by statements made by plaintiff. Thus, the failure to discuss Kanellis's
7 statement is harmless error; alternatively, defendant argues that consideration of Kanellis's statement
8 supports the ALJ's findings that plaintiff can perform light work.

9 "One reason for which an ALJ may discount lay testimony is that it conflicts with medical
10 evidence." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (citing *Vincent v. Heckler*, 739 F.2d
11 1393, 1395 (9th Cir.1984)). Kanellis's statements that plaintiff had limited activities and problems
12 with her memory are not inconsistent with the ALJ's conclusion that she could do light work. In
13 addition, to the extent that plaintiff seeks consideration of Kanellis's statements to contradict the
14 conclusions of medical doctors, her opinion was properly disregarded. *See Vincent*, 739 F.2d at
15 1395.

16 IV. ORDER

17 For the foregoing reasons, the decision of the Commissioner is affirmed. Accordingly, the
18 court denies plaintiff's motion for summary judgment and grants defendant's cross-motion for
19 summary judgment.

20
21 DATED: 8/28/06



RONALD M. WHYTE
United States District Judge

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